

***7 Official Opinions of the Compliance Board 8 (2010)***

**Minutes – Procedure – Failure to prepare and approve minutes within reasonable period violated Act**

**Minutes – Preparation following all meetings, including public hearings, required**

**Minutes – Closed Session Statement – Merely paraphrasing statutory exception inadequate**

**Minutes – Preparation responsibility of public body**

January 26, 2010

*Sveinn C. Storm*

The Open Meetings Compliance Board has considered your complaint that the Centreville Town Council and the Town's Planning Commission have violated the Open Meetings Act with respect to their obligations to produce minutes in a timely manner and to document closed sessions.

For the reasons explained below, we find that the Council and the Planning Commission violated the Open Meetings Act in failing to approve minutes of certain public meetings in a timely fashion. We also find that the Council failed to provide an adequate description of topics discussed as part of publicly available minutes following certain closed sessions.

**I**

**Minutes – In General**

***A. Complaint and Response***

According to the complaint, the Council failed to produce minutes for specified meetings, namely, a work session conducted on June 19, 2008, a public hearing held October 1, 2009, and a meeting held on October 11, 2009, with representatives of the U.S. Army Corps of Engineers. The complaint further alleged that the Council failed to approve minutes for meetings held on September 17, 2009, and October 1, 2009, in a timely manner in that the minutes for these meetings were not available until November 5, 2009.

As to the Planning Commission, the complaint alleged that no minutes were produced for a public hearing held on September 9, 2009, and that minutes were not available for meetings held on August 19 and September 16, 2009, until November 5, 2009.

The complaint also questioned whether minutes for closed sessions held on September 17 and 21, and on October 1, 2009 have ever been approved.<sup>1</sup>

Stephen Kehoe, attorney for the Town of Centreville, responded on behalf of both public bodies. As to the Council's work session held on June 19, 2008, the response stated that, before October 5, 2009, the Town Clerk was responsible for producing minutes. The purpose of the work session as to provide feedback to staff on the proposed budget which was adopted the following day. However, the response indicated that, "[i]t is unclear why ... minutes were not available earlier." As for the public hearing held on October 1, 2009, the response repeated that it was the Town Clerk who was responsible for producing minutes before October 5, 2009, and the delay "may have been the result in the vacancy in the Office of Town Clerk on October 5, 2009."

As to the Council's regular meeting on October 1, 2009, the response indicated that the delay in the availability of minutes "may be attributable to the vacancy in the office of Town Clerk." Although minutes were not available at the next regular meeting on October 15, they were subsequently available. As to the September 17, 2009, meeting, the response was unable to provide a definitive reason why minutes were not available at the next regular meeting. It stated that the Town Manager endeavored to have minutes prepared after the office of Town Clerk became vacant and said that minutes for the September 17 meeting were available November 5, 2009.

As to the alleged Council meeting on October 11, the response indicated that, although the meeting had been announced, no meeting between the Army Corps of Engineers and Council took place. Instead, a single member of the Council met with representatives of the Corps.

In terms of the Planning Commission, the response indicated that it was unclear why minutes were not available sooner following the August 19, 2009, meeting. The Town Clerk had been responsible for producing minutes and, as noted above, that office has been vacant since October 5, 2009. While minutes for the September 16, 2009, meeting were not available at the next regular monthly meeting, according to the response, they were available the

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<sup>1</sup> While neither the complaint nor the response make clear whether these sessions involved the Council or the Planning Commission, based on the dates, they appear to relate to the Council.

following month. Finally, as to the public hearing held September 9, 2009, the response included a copy of a matrix reflecting public comments which was used as a guide in the Commission's subsequent discussion on proposed design standards. However, the Commission did not adopt the matrix as minutes of its meeting.

As to the closed meetings held September 17 and 21 and October 1, 2009, the response indicated that minutes were approved on December 16, 2009.

***B. Analysis***

As to the Council's alleged meeting on October 11, 2009, with representatives of the Army Corps of Engineers, no violation occurred in that minutes were not required because a quorum of the Council never met. Stated otherwise, the Open Meetings Act did not apply to the meeting. However, as to other Council meetings identified in the complaint, minutes were either never produced or, in the complainant's view, not available in a timely manner.

After a public body holds a meeting that is subject to the Open Meetings Act, the public body must have written minutes prepared. §10-509(b). The Act makes no distinction based on the purpose of the meeting, such as whether the meeting involved a public hearing. *Cf.* 6 *OMCB Opinions* 47, 51 (2008). If the meeting is governed by the Act, minutes are required. *Id.* While a public body certainly may have staff prepare minutes for its review and approval, ultimate responsibility for the preparation of minutes under the Act rests with the public body.

Rather than prescribe an exact time frame by which minutes must be approved, the Open Meetings Act allows some flexibility in that it employs a "as soon as practicable" standard. 6 *OMCB Opinions* at 51. We have long held that, as a general rule, "[t]he cycle of minutes preparation should parallel the cycle of a public body's meetings, with only the lag time needed to draft and review minutes." 2 *OMCB Opinions* 87, 89 (1999). Nevertheless, there may be special circumstances that result in an excusable delay. 5 *OMCB Opinions* 14, 17 (2006). However, we also have previously cautioned that a public body may not rely on insufficient staff or on competing priorities as excuses for not complying with the Act. *Id.*

We understand that a vacancy in the position of Town Clerk disrupted the timely production of minutes. Thus, the delay in the availability of minutes for Council meetings until November 5, 2009, may reasonably be excused for those meetings that occurred during October 2009. However, the lack of minutes and the delay for earlier meetings appears extensive in that the Council regularly meets twice each month. The Council was responsible under

the Act for ensuring that minutes were completed for its review and approval. *See 4 OMCB Opinions 24 (2004).*

The Planning Commission regularly meets once each month. For the reason explained above, the delay in producing minutes following its September 16, 2009, meeting is reasonably excusable. But there is less basis for excusing the delay in producing minutes of its August 19, 2009, meeting. As to the public hearing held on September 9, 2009, the Commission did produce a detailed matrix summarizing individuals' testimony. Had the document been approved by the Commission, we simply note that it may well have satisfied the Act's requirement for minutes.

Finally, as to approval of minutes of closed sessions held in September and October 2009 on December 16, 2009, we find no violation. Unlike the delay in approval of publicly available minutes, the public was not prejudiced by the delay involving the closed meetings at issue since such minutes are normally sealed. *4 OMCB Opinions 1 (2004).*

## **II**

### **Public Record Following Closed Sessions**

#### ***A. Complaint and Response***

The second allegation in the complaint concerned the subsequent reporting of closed sessions as part of the publicly-available minutes of the Council. The complaint cited the disclosures following ten meetings which, in the complainant's view, "merely repeat[ed] the statutory exception without offering any detail" and consisted of "inadequate boilerplate." For example, the complaint stated that the minutes addressing a closed session held April 22, 2009, indicated that "[t]he Council discussed personnel issues regarding a personnel matter, and received the advice of counsel."<sup>2</sup>

In response, the municipal attorney provided a synopsis of each closed meeting identified in the complaint and corrected the description of what occurred at one closed meeting. The response noted that in reporting personnel matters, the Council faces a tension between the disclosure

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<sup>2</sup> The complaint provided additional examples concerning closed sessions held on March 19, 23, and 30, May 7 and 21, June 4, August 20, and September 10 and 17, 2009. The level of reported detail for each of these closed sessions was similar.

requirements under §10-509<sup>3</sup> and the privacy considerations under §10-508(a)(1)(ii). According to the response, “[t]he Town has 28 employees. While the Council wishes to provide the public with information about its workings, it does not want to provide such information as to make it apparent which employee or employees were being discussed.”

***B. Analysis***

If a public body closes a meeting under the Open Meetings Act, certain procedures must be followed. Germane to the complaint is the required disclosure following a closed session as part of the public body’s publicly available minutes:

If a public body meets in closed session, the minutes for its next open session shall include:

- (i) a statement of the time, place and purpose of the closed session;
- (ii) a record of the vote of each member as to closing the meeting;
- (iii) a citation of the authority under this subtitle for closing the session; and
- (iv) a listing of the topics of discussion, persons present, and each action taken during the session.

§10-509(c)(2).<sup>4</sup> The purpose of the required disclosure is to assist the public in holding public bodies accountable for their actions during closed sessions. 4 *OMCB Opinions* 24, 25 (2004). To be sure, the summary of the closed session disclosed in publicly available minutes ought not be so detailed so as to defeat the desired confidentiality justifying the closed meeting. But we have repeatedly reminded public bodies that merely paraphrasing the applicable

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<sup>3</sup> All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

<sup>4</sup> While the Act refers to disclosure as part of the minutes of the next public session, we have approved the practice of documenting a closed session as part of the publicly available minutes of a public session the same date under the rationale that the practice results in an earlier disclosure to the public. *See, e.g., 4 OMCB Opinions* 88, 97 (2004).

statutory exception is not sufficient. *See, e.g., 5 OMCB Opinions* 139, 145 (2007).

The response did not dispute that the complaint accurately described the summary of the closed sessions. We find that the description in each session identified in the complaint was legally deficient. The descriptions provided the public with no basis on which to evaluate the identified topic of discussion in light of applicable statutory authority cited as a basis for closure. While we are sensitive to the privacy concerns mentioned in the response, the Act requires a disclosure that provides some detail beyond repeating the statutory justification. In many cases, the synopsis of each closed session offered as part of the Town's response would have been more than adequate had it been included in the minutes and it would not have compromised the Council's purpose of closing the meeting.

### **III**

#### **Minutes of Closed Meetings**

##### ***A. Complaint and Response***

The final allegations in the complaint pertain to the approval of minutes of closed meetings. According to the complaint, minutes of closed sessions have not been approved during public sessions for over two years. In the complainant's view, "[T]his is disturbing since approval of minutes does not fall under any of the permitted reasons for closing a meeting..." The complaint continued, "[i]f the minutes are being approved in closed session, than that fact is not being reported as one of the actions taken in the closed session." The complaint identified 49 meetings at issue, dating back to September 20, 2007.

The response simply noted that, before October 5, 2009, it was the responsibility of the Town Clerk to produce minutes and that it was unclear why minutes were not produced. However, "reports of closed sessions are always included in the minutes of the open meetings immediately following the closed session ..."

##### ***B. Analysis***

The response does not offer us sufficient detail as to the manner in which minutes of these meetings were approved. To be sure, a public body is required to keep minutes of meetings closed under the Act and approval by the public body is required. As noted above, a delay in such approval is not ordinarily considered a violation if the minutes are to remain sealed. However, if it is accurate that minutes of closed sessions were not approved for a two-

year period, that delay appears excessive. But given the limited response as to this issue, we decline to reach a decision. *See* §10-502.5(f)(2). However, we note, without deciding, that the approval of minutes may well qualify as an administrative function outside the scope of the Open Meetings Act. §10-503(a)(1)(i).

#### **IV**

#### **Conclusion**

We find that both the Council and the Planning Commission violated the Open Meetings Act in failing to approve minutes of certain public meetings in a timely fashion. Furthermore, we find that the Council violated the Act by failing to provide an adequate description of topics discussed as part of publicly available minutes following certain closed sessions.<sup>5</sup>

#### **OPEN MEETINGS COMPLIANCE BOARD**

*Elizabeth L. Nilson, Esquire*  
*Courtney J. McKeldin*  
*Julio Morales, Esquire*

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<sup>5</sup> The complaint requested that we “take actions” on the violations. However, opinions of the Compliance Board are strictly advisory; we have no enforcement authority. §10-502.5(i); 3 *OMCB Opinions* 328, 333 (2003).